
EXHIBIT 25

▷ Concha v. London
C.A.9 (Cal.), 1995.

United States Court of Appeals, Ninth Circuit.
Pano CONCHA, M.D. and Marta Concha, as
fiduciaries and on behalf of all the participants and
beneficiaries of The Pano Concha, M.D., a
Professional Corporation Defined Benefit Pension
Plan; The Pano Concha, M.D., a Professional
Corporation Defined Benefit Plan, Plaintiffs-
Appellants,

v.

Philip D. LONDON; London & Lichtenberg, an
accountancy corporation; Matthew Lichtenberg;
London, Caldwell & Lewinson; Alan B. Lewinson;
Thomas F. Caldwell, Jr.; London & Lewinson;
Caldwell & Lewinson; Michael Weatherford;
Southland Pension Services, Inc., William A.
Saborsky; Daniel J. Van Mieghem, Integrated
Pension Services, Inc.; David L. Brady, a
professional corporation; King, Brady & Bazar, a law
corporation; Marc Paul Jacobs; Wood, Lucksinger &
Epstein; Jerry L. Freeman; King & Brady, a law
corporation; and Does 1 through 1000, inclusive,
Defendants-Appellees.

Pano CONCHA, M.D. and Marta Concha, Plaintiffs-
Appellants,

v.

Philip D. LONDON; London & Lichtenberg, an
accountancy corporation; Matthew Lichtenberg;
London, Caldwell & Lewinson; Alan B. Lewinson;
Thomas F. Caldwell, Jr.; London & Lewinson;
Caldwell & Lewinson; Michael Weatherford; David
L. Brady, a professional corporation; King, Brady &
Bazar, a law corporation; Marc Paul Jacobs; Wood,
Lucksinger & Epstein; Jerry L. Freeman; King &
Brady, a law corporation; and Does 1 through 1000,
inclusive, Defendants-Appellees.

Nos. 93-55478, 93-55695.

Argued and Submitted Oct. 5, 1994.

Decided Aug. 15, 1995.

Fiduciaries of pension and benefit plans sued
accountants, actuaries, and attorneys alleging
violations of Employee Retirement Income Security
Act (ERISA) plan and state law in connection with
administration of plan. The United States District

Court for the Central District of California, dismissed
complaint. Fiduciaries appealed. Fiduciaries brought
state court action against accountants and attorneys
alleging violations of state law in connection with
administration of plan, and action was removed to
federal court. The District Court, Manuel L. Real, J.,
denied fiduciaries' motion to remand and dismissed
action. Fiduciaries appealed. The Court of Appeals,
Reinhardt, Circuit Judge, held that: (1) fiduciaries
had standing to bring first action; (2) fiduciaries
stated cause of action under ERISA in first action
against accountants and actuaries for breach of
fiduciary duty; (3) rule, requiring that circumstances
constituting fraud or mistake be stated with
particularity in complaint, would not be extended to
cases in which complaint alleged breaches of
fiduciary duty under ERISA; (4) attorneys could be
held liable in first action even though they were not
plan fiduciaries; (5) fiduciaries stated cause of action
in first action against accountants, actuaries, and
attorneys for participation in prohibited transactions;
(6) fiduciaries' state-law claims in first action were
preempted by ERISA; (7) dismissal of fiduciary's
second action, pursuant to notice of voluntary
dismissal, was with prejudice, and thus was final
appealable order over which Court of Appeals had
jurisdiction; and (8) claims in second action were
preempted by ERISA.

Affirmed in part, reversed in part, and remanded.

Wallace, Chief Judge, concurred in part, dissented in
part, and filed opinion.

West Headnotes

[1] Labor and Employment 231H 407

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(A) In General

231Hk407 k. Preemption. Most Cited

Cases

(Formerly 296k22)

States 360 18.51

360 States360I Political Status and Relations360I(B) Federal Supremacy; Preemption360k18.45 Labor and Employment360k18.51 k. Pensions and Benefits.Most Cited Cases

Claim for equitable relief under ERISA was not subject to preemption. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[2] Labor and Employment 231H ⚡646231H Labor and Employment231HVII Pension and Benefit Plans231HVII(K) Actions231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk646 k. Parties in General; Standing. Most Cited Cases
(Formerly 296k85)

Fiduciaries of ERISA plan had standing as fiduciaries of plan to bring action against plan administrators for breach of fiduciary duty and participation in prohibited transactions. Employee Retirement Income Security Act of 1974, §§ 404, 409, 502(a)(2), 29 U.S.C.A. §§ 1104, 1109, 1132(a)(2).

[3] Labor and Employment 231H ⚡646231H Labor and Employment231HVII Pension and Benefit Plans231HVII(K) Actions231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk646 k. Parties in General; Standing. Most Cited Cases
(Formerly 296k85)

Fiduciaries bringing suit on behalf of ERISA plan could sue cofiduciaries for breaches of fiduciary duty. Employee Retirement Income Security Act of 1974, §§ 404, 409, 502(a)(2), 29 U.S.C.A. §§ 1104, 1109, 1132(a)(2).

[4] Federal Courts 170B ⚡794170B Federal Courts170BVIII Courts of Appeals170BVIII(K) Scope, Standards, and Extent170BVIII(K)3 Presumptions170Bk794 k. Pleadings. Most CitedCases

In appeal of action that was dismissed for failure to state claim, allegations contained in complaint would be read in light most favorable to plaintiffs. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[5] Labor and Employment 231H ⚡649231H Labor and Employment231HVII Pension and Benefit Plans231HVII(K) Actions231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties231Hk649 k. Pleading. Most CitedCases(Formerly 296k83.1)

Fiduciaries of ERISA plan stated cause of action in complaint against accountants and actuaries for breach of fiduciary duty; complaint specifically alleged that accountants and actuaries were fiduciaries, that actuaries were given and accepted discretion to manage plan, and that accountants were given and accepted discretion to manage plan on day-to-day basis. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104.

[6] Labor and Employment 231H ⚡461231H Labor and Employment231HVII Pension and Benefit Plans231HVII(C) Fiduciaries and Trustees231Hk460 Who Are Fiduciaries231Hk461 k. In General. Most CitedCases(Formerly 296k44)

No express delegation of fiduciary duty in ERISA plan instrument is necessary for persons performing duties of fiduciary nature to be considered fiduciaries. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104.

[7] Labor and Employment 231H ⚡466231H Labor and Employment231HVII Pension and Benefit Plans231HVII(C) Fiduciaries and Trustees231Hk460 Who Are Fiduciaries

231Hk466 k. Attorneys and Other Professionals. Most Cited Cases

(Formerly 296k44)

One must perform more than the usual professional services in order to be considered fiduciary of ERISA plan. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104.

[8] Federal Civil Procedure 170A ⚡636

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases
Purpose of rule, requiring that circumstances constituting fraud or mistake be stated with particularity in complaint, is to ensure that defendants accused of conduct specified have adequate notice of what they are alleged to have done, so that they may defend against accusations; without such specificity, defendants would be put to unfair disadvantage, since at early stages of proceedings they could do no more than generally deny any wrongdoing. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[9] Labor and Employment 231H ⚡649

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk649 k. Pleading. Most Cited Cases

(Formerly 296k83.1)

Rule, requiring that circumstances constituting fraud or mistake be stated with particularity in complaint, would not be extended to cases in which complaint alleges breaches of fiduciary duty under ERISA, and does not allege fraud or mistake; circumstances surrounding alleged breaches of fiduciary duty, unlike those surrounding alleged fraud, may frequently defy particularized identification at pleading stage. Employee Retirement Income Security Act of 1974, § 404, 29 U.S.C.A. § 1104; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[10] Fraud 184 ⚡3

184 Fraud

184I Deception Constituting Fraud, and Liability Therefor

184k2 Elements of Actual Fraud

184k3 k. In General. Most Cited Cases

Fraud arises from plaintiff's reliance on defendant's false representations of material fact, made with knowledge of falsity and intent to deceive.

[11] Federal Civil Procedure 170A ⚡636

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases
Plaintiffs may fairly be expected to identify with specificity in complaint defendant's alleged misrepresentation, though they are not expected to plead with specificity defendant's state of mind. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[12] Federal Civil Procedure 170A ⚡636

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases
Fraud plaintiffs are required by rule to specifically plead those facts surrounding alleged acts of fraud to which they can reasonably be expected to have access. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[13] Federal Civil Procedure 170A ⚡636

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, Mistake and Condition of Mind. Most Cited Cases
Where fraud is alleged, Court of Appeals relaxes pleading requirements where relevant facts are known only to defendant. Fed.Rules Civ.Proc.Rule

9(b), 28 U.S.C.A.

[14] Labor and Employment 231H ⚡498

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk495 Persons Liable

231Hk498 k. Non-Fiduciaries; Parties in Interest. Most Cited Cases
(Formerly 296k49)

Attorneys could be held liable to ERISA plan even though they were not plan fiduciaries, in action for equitable relief based on allegation that attorneys engaged in prohibited transactions; ERISA section prohibiting fiduciary from causing plan to engage in certain transactions was applicable to party in interest who engaged in transactions enumerated in section governing prohibited transactions. Employee Retirement Income Security Act of 1974, §§ 406, 406(a)(1), 29 U.S.C.A. §§ 1106, 1106(a)(1).

[15] Labor and Employment 231H ⚡649

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk649 k. Pleading. Most Cited Cases

(Formerly 296k83.1)

ERISA fiduciaries stated cause of action in complaint against accountants, actuaries, and attorneys for participation in prohibited transactions; complaint alleged that accountants and actuaries were employed to administer plan, that attorneys were retained by and acted as attorneys to plan, and that all defendants took plan assets for their personal use, engaged in self-dealing, and loaned out assets on prohibited terms. Employee Retirement Income Security Act of 1974, § 3(14)(B), 29 U.S.C.A. § 1002(14)(B).

[16] Labor and Employment 231H ⚡660

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk658 Judgment and Relief

231Hk660 k. Equitable Relief;

Injunction. Most Cited Cases

(Formerly 296k87)

Equitable relief is sole recourse for ERISA claims against nonfiduciaries. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[17] Labor and Employment 231H ⚡639

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)1 In General

231Hk639 k. Judgment and Relief. Most Cited Cases

(Formerly 296k87)

Relief under ERISA section providing for suit by participant, beneficiary, or fiduciary to obtain equitable relief does not provide for compensatory or punitive damages. Employee Retirement Income Security Act of 1974, § 502(a)(3), 29 U.S.C.A. § 1132(a)(3).

[18] Labor and Employment 231H ⚡498

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(C) Fiduciaries and Trustees

231Hk495 Persons Liable

231Hk498 k. Non-Fiduciaries; Parties in Interest. Most Cited Cases

(Formerly 296k87)

Section of ERISA providing for action to obtain equitable relief permits obtaining remedies available in equity against nonfiduciaries as well as against fiduciaries. Employee Retirement Income Security Act of 1974, § 502(a)(3), 29 U.S.C.A. § 1132(a)(3).

[19] Labor and Employment 231H ⚡407

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(A) In General

231Hk407 k. Preemption. Most Cited Cases

(Formerly 296k83.1)

States 360 ⚡18.51

360 States360I Political Status and Relations360I(B) Federal Supremacy; Preemption360k18.45 Labor and Employment360k18.51 k. Pensions and Benefits.Most Cited Cases

Fiduciaries' state-law claims against cofiduciaries were preempted by ERISA, since fiduciaries had standing to bring ERISA action and their claims related to administration of plan covered by ERISA. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

[20] Labor and Employment 231H ⚡407231H Labor and Employment231HVII Pension and Benefit Plans231HVII(A) In General231Hk407 k. Preemption. Most CitedCases

(Formerly 296k22)

States 360 ⚡18.51360 States360I Political Status and Relations360I(B) Federal Supremacy; Preemption360k18.45 Labor and Employment360k18.51 k. Pensions and Benefits.Most Cited Cases

ERISA's preemption clause is not limited to state laws specifically designed to affect employee benefit plans, but extends to all claims that arise from administration of such plans whether directly or indirectly. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

[21] Labor and Employment 231H ⚡407231H Labor and Employment231HVII Pension and Benefit Plans231HVII(A) In General231Hk407 k. Preemption. Most CitedCases

(Formerly 296k22)

States 360 ⚡18.51360 States360I Political Status and Relations360I(B) Federal Supremacy; Preemption360k18.45 Labor and Employment360k18.51 k. Pensions and Benefits.Most Cited Cases

ERISA does not preempt state-law claims of plaintiffs who are without standing to challenge ERISA violations. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

[22] Labor and Employment 231H ⚡407231H Labor and Employment231HVII Pension and Benefit Plans231HVII(A) In General231Hk407 k. Preemption. Most CitedCases

(Formerly 296k22)

States 360 ⚡18.51360 States360I Political Status and Relations360I(B) Federal Supremacy; Preemption360k18.45 Labor and Employment360k18.51 k. Pensions and Benefits.Most Cited Cases

If plaintiff is not participant, beneficiary, or fiduciary in ERISA plan, then his or her state law claims fall outside ERISA's sphere and are not subject to preemption. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

[23] Federal Courts 170B ⚡589170B Federal Courts170BVIII Courts of Appeals170BVIII(C) Decisions Reviewable170BVIII(C)2 Finality of Determination170Bk585 Particular Judgments,Decrees or Orders, Finality170Bk589 k. Dismissal and Nonsuitin General. Most Cited Cases

Dismissal of plaintiffs' action, pursuant to notice of voluntary dismissal, was with prejudice, and thus was final appealable order over which Court of Appeals had jurisdiction; although notice purported to dismiss action without prejudice, notice was intended to permit plaintiffs to appeal underlying order that they

62 F.3d 1493, 33 Fed.R.Serv.3d 181, 95 Cal. Daily Op. Serv. 6414, 95 Daily Journal D.A.R. 10,955, Pens. Plan Guide (CCH) P 23911U
(Cite as: 62 F.3d 1493)

considered determinative, in that prior to District Court ruling on plaintiffs' motion to remand, parties entered into stipulations providing that, if motion were denied, plaintiffs would dismiss their complaint while preserving appeal rights in state action. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[24] Removal of Cases 334 ⚡107(9)

334 Removal of Cases

334VII Remand or Dismissal of Case

334k107 Proceedings for Remand and Review Thereof

334k107(9) k. Review. Most Cited Cases
Order refusing to remand is not final appealable order under rule governing final decisions of district courts; nor does such order fall within collateral order exception to requirement of finality. 28 U.S.C.A. § 1291.

[25] Federal Civil Procedure 170A ⚡1701.1

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1701 Time for Dismissal; Condition of Cause

170Ak1701.1 k. In General. Most Cited Cases

Plaintiff has absolute right voluntarily to dismiss action prior to service by defendant of answer or motion for summary judgment. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[26] Federal Civil Procedure 170A ⚡1701.1

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1701 Time for Dismissal; Condition of Cause

170Ak1701.1 k. In General. Most Cited Cases

Even if defendant has filed motion to dismiss, plaintiff may terminate action voluntarily by filing notice of dismissal. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[27] Federal Civil Procedure 170A ⚡1710

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1710 k. Order. Most Cited Cases

Federal Civil Procedure 170A ⚡1713.1

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1713 Effect

170Ak1713.1 k. In General. Most Cited Cases

Voluntary dismissal pursuant to notice of dismissal filed by plaintiff is effective on filing, and no court order is required. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[28] Federal Civil Procedure 170A ⚡1694

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1694 k. Dismissal of Part of Cause of Action. Most Cited Cases

Federal Civil Procedure 170A ⚡1695

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1695 k. Dismissal as to Part of Parties in General. Most Cited Cases

Plaintiff may dismiss either some or all defendants, or some or all claims, through notice of dismissal. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[29] Federal Civil Procedure 170A ⚡1708

170A Federal Civil Procedure

170AXI Dismissal

170AXI(A) Voluntary Dismissal

170Ak1708 k. Notice. Most Cited Cases

Filing notice of voluntary dismissal with court automatically terminates action as to defendants who are subjects of notice. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[30] Federal Civil Procedure 170A ⚡ 1713.1170A Federal Civil Procedure170AXI Dismissal170AXI(A) Voluntary Dismissal170Ak1713 Effect170Ak1713.1 k. In General. Most CitedCases

Unless otherwise stated, voluntary dismissal pursuant to notice by plaintiff is ordinarily without prejudice to plaintiff's right to commence another action for same cause against same defendants. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[31] Federal Civil Procedure 170A ⚡ 1713.1170A Federal Civil Procedure170AXI Dismissal170AXI(A) Voluntary Dismissal170Ak1713 Effect170Ak1713.1 k. In General. Most CitedCases

Voluntary dismissal pursuant to notice by plaintiff leaves parties as though no action had been brought. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[32] Federal Courts 170B ⚡ 557170B Federal Courts170BVIII Courts of Appeals170BVIII(C) Decisions Reviewable170BVIII(C)1 In General170Bk554 Nature, Scope and Effect ofDecision

170Bk557 k. Dismissal, Nonsuit, Direction of Verdict or Summary Judgment. Most Cited Cases

Although procedure for obtaining voluntary dismissal pursuant to notice by plaintiff is different from procedure for obtaining voluntary dismissal pursuant to court order, rules regarding appealability of such dismissals are generally the same. Fed.Rules Civ.Proc.Rule 41(a)(1, 2), 28 U.S.C.A.

[33] Federal Civil Procedure 170A ⚡ 1713.1170A Federal Civil Procedure170AXI Dismissal170AXI(A) Voluntary Dismissal170Ak1713 Effect170Ak1713.1 k. In General. Most CitedCases

Voluntary dismissal with prejudice pursuant to notice by plaintiff has same effect as voluntary dismissal with prejudice pursuant to court order. Fed.Rules Civ.Proc.Rule 41(a)(1, 2), 28 U.S.C.A.

[34] Federal Civil Procedure 170A ⚡ 1713.1170A Federal Civil Procedure170AXI Dismissal170AXI(A) Voluntary Dismissal170Ak1713 Effect170Ak1713.1 k. In General. Most CitedCases

Voluntary dismissal without prejudice pursuant to notice by plaintiff has same effect as voluntary dismissal without prejudice pursuant to court order. Fed.Rules Civ.Proc.Rule 41(a)(1, 2), 28 U.S.C.A.

[35] Federal Courts 170B ⚡ 589170B Federal Courts170BVIII Courts of Appeals170BVIII(C) Decisions Reviewable170BVIII(C)2 Finality of Determination170Bk585 Particular Judgments,Decrees or Orders, Finality170Bk589 k. Dismissal and Nonsuitin General. Most Cited Cases

Voluntary dismissal without prejudice is ordinarily not final judgment from which plaintiff may appeal. Fed.Rules Civ.Proc.Rule 41(a), 28 U.S.C.A.

[36] Federal Courts 170B ⚡ 557170B Federal Courts170BVIII Courts of Appeals170BVIII(C) Decisions Reviewable170BVIII(C)1 In General170Bk554 Nature, Scope and Effect ofDecision

170Bk557 k. Dismissal, Nonsuit, Direction of Verdict or Summary Judgment. Most Cited Cases

Plaintiff may not appeal from joint stipulation to voluntary dismissal, entered unconditionally by court pursuant to settlement agreement. Fed.Rules Civ.Proc.Rule 41(a)(2), 28 U.S.C.A.

[37] Federal Courts 170B ⚡557**170B Federal Courts****170BVIII Courts of Appeals****170BVIII(C) Decisions Reviewable****170BVIII(C)1 In General****170Bk554 Nature, Scope and Effect of Decision**

170Bk557 k. Dismissal, Nonsuit, Direction of Verdict or Summary Judgment. **Most Cited Cases**

Plaintiff may appeal voluntary dismissal only when it is with prejudice to his or her right to commence another action for same cause or otherwise subjects him or her to prejudicial terms or conditions. Fed.Rules Civ.Proc.Rule 41(a), 28 U.S.C.A.

[38] Federal Courts 170B ⚡554.1**170B Federal Courts****170BVIII Courts of Appeals****170BVIII(C) Decisions Reviewable****170BVIII(C)1 In General****170Bk554 Nature, Scope and Effect of Decision**

170Bk554.1 k. In General. **Most Cited Cases**

Appealability of order depends on its effect rather than its language.

[39] Labor and Employment 231H ⚡407**231H Labor and Employment****231HVII Pension and Benefit Plans****231HVII(A) In General****231Hk407 k. Preemption. Most Cited Cases**

(Formerly 296k83.1)

States 360 ⚡18.51**360 States****360I Political Status and Relations****360I(B) Federal Supremacy; Preemption****360k18.45 Labor and Employment****360k18.51 k. Pensions and Benefits. Most Cited Cases**

ERISA fiduciaries' state-law claims were preempted by ERISA, since they concerned co-fiduciaries' alleged misdeeds in connection with ERISA plan,

notwithstanding self-serving disclaimer inserted on face of pleading. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

[40] Labor and Employment 231H ⚡631**231H Labor and Employment****231HVII Pension and Benefit Plans****231HVII(K) Actions****231HVII(K)1 In General****231Hk631 k. Jurisdiction and Venue. Most Cited Cases**

(Formerly 296k83.1)

District court may properly assert federal jurisdiction where complaint raises claims that fall within ERISA's broad preemptive scope. Employee Retirement Income Security Act of 1974, § 514(a), 29 U.S.C.A. § 1144(a).

***1497** Philip W. Boesch, Jr., Alan R. Kossoff, Stephen L. Raucher, Kinsella, Boesch, Fujikawa & Towle, Los Angeles, CA, for plaintiffs-appellants.

Dean B. Herman, John H. Odendahl, Gabriel, Herman & Peretz, Los Angeles, CA, for defendants-appellees Philip D. London; London & Lichtenberg, an Accountancy Corp.; Matthew Lichtenberg; London, Caldwell & Lewinson; Alan B. Lewinson; Thomas F. Caldwell, Jr.; London & Lewinson; Caldwell & Lewinson; and Michael Weatherford.

Wayne S. Grajewski, Kim W. West, Martin L. Togni, Arter, Hadden, Lawler, Felix & Hall, Los Angeles, CA, for defendants-appellees Southland Pension Services, Inc.; William A. Saborsky; Daniel J. Van Mieghem; and Integrated Pension Services, Inc.

Jan Copley, Pasadena, CA, for defendants-appellees David L. Brady and David L. Brady, a Professional Corp.

Jerry Edelman, Warren K. Miller, Los Angeles, CA, for defendants-appellees Marc Paul Jacobs and King, Weiser, Edelman & Bazar, a Law Corp.

Appeals from the United States District Court for the Central District of California.

Before: WALLACE, Chief Judge, REINHARDT, Circuit Judge, and TANNER, ^{FN*}District Judge.

^{FN*} The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by

designation.

Opinion by Judge REINHARDT; Partial Concurrence and Partial Dissent by Chief Judge WALLACE.

REINHARDT, Circuit Judge:

Pano Concha, M.D. and his ex-wife Marta Concha ("the Conchas"), on behalf of the Pano Concha, M.D., Professional Corporation Defined Benefit Plan ("the Plan"), appeal the district court's decisions in two separate actions. In Appeal No. 93-55478 ("*Concha I*"), the Conchas appeal the district court's dismissal of their complaint, which alleged that the defendants violated their duties to the Plan under the Employee Retirement Income Security Act ("ERISA") and under state law. We affirm the dismissal of the Conchas' state law claims, but reverse the part of the dismissal of their ERISA claims that is challenged on appeal. We conclude that the Conchas have standing under ERISA and that they have stated claims against all the defendants.

After the dismissal of the Conchas' state law claims in *Concha I*, the Conchas filed a new complaint in state court. When the defendants removed that action to federal court and the district court refused to remand, the Conchas filed a notice purporting to dismiss the action without prejudice. The district court subsequently entered an order dismissing with prejudice as to some of the defendants. In Appeal No. 93-55695 ("*Concha II*"), the Conchas seek to challenge the district court's refusal to remand the second complaint. We first conclude that the action should be treated as having been dismissed with prejudice as to all defendants. We thus have jurisdiction over this appeal. Next, we conclude that the Conchas' motion to remand was properly denied.

I. BACKGROUND

Dr. Concha is a heart surgeon. At all relevant times, he and his wife were employees of Pano Concha, M.D., A Professional Corporation ("the Corporation"). In addition, Dr. and Mrs. Concha allege that they are participants, beneficiaries, and fiduciaries with respect to the Corporation's pension plan. The Conchas allege that they entrusted control and management over the Plan to their longtime accountant, Philip London of the London &

Lichtenberg accountancy corporation. The London Defendants (London and his firm) were given and accepted "the discretion necessary to administer the Plan on a day-to-day basis." The Southland Defendants are actuaries who were given and accepted "the discretion necessary to administer*1498 the Plan." The Brady and Jacobs Defendants are attorneys who were retained by and acted as attorneys for the Plan. Dr. and Mrs. Concha allege that all these defendants mismanaged the Plan's assets, thereby breaching their duties under ERISA and state law.

II. CONCHA I

A. Facts and Proceedings

The Conchas filed their complaint in *Concha I* in the district court for the Central District of California. The Conchas alleged that, at all relevant times, they were employees of the Corporation and participants in the Plan. Their complaint contains seven claims: (1) breach of ERISA fiduciary duty; (2) state law breach of fiduciary duty; (3) state law negligence; (4) state law fraud; (5) state law breach of contract; (6) state law negligent misrepresentation; and (7) equitable relief under ERISA.

In response to the Conchas' original complaint, the defendants moved for dismissal pursuant to Fed.R.Civ.P. Rule 12(b)(6). Defendants asserted that all the state laws claims (counts two through six) should be dismissed, because they are preempted by ERISA. They also argued that the state law fraud claim (count four) should be dismissed on the ground that the Conchas had failed to plead with specificity any facts relating to the alleged fraud or misrepresentation, as required by Rule 9(b). While some of the defendants argued that the Conchas' claim for equitable relief under ERISA (count seven) should be dismissed for failure to state a claim, others conceded that this count stated a claim on which relief could be granted.^{FN1} The district court dismissed the complaint with leave to amend.

^{FN1}. The London Defendants, Brady Defendants, and Jacobs Defendants argued that this count should be dismissed. The Southland Defendants, however, acknowledged that counts one and seven could be construed as cognizable claims

under ERISA and should be allowed to proceed.

[1] The Conchas subsequently filed a first amended complaint in *Concha I*. This complaint was virtually identical to the original complaint. Each group of defendants again moved to dismiss, on grounds similar to those stated in their prior motions. In addition, the London Defendants moved to dismiss the claim for breach of ERISA fiduciary duty (count one), on the ground that the Conchas lacked standing. This time, the district court dismissed counts two through seven with prejudice on the ground that these counts were preempted by ERISA.^{FN2} The court also granted the London Defendants' motion to dismiss count one, but with respect to this count provided the Conchas with leave to amend.

FN2. The district court's order dismissing the first amended complaint states that counts two through seven were dismissed with prejudice because of ERISA preemption. Count seven, however, is a claim for equitable relief under ERISA and thus was not subject to preemption. The court apparently made an inadvertent error in dismissing this count of the first amended complaint along with the five state-law claims. In their second amended complaint, the Conchas once again included counts two through seven. The defendants again sought dismissal of those counts, this time on the ground that they had already been dismissed with prejudice. The district court dismissed the second amended complaint with prejudice without stating reasons. On appeal, the parties treat the dismissal of count seven as a dismissal for failure to state a claim on which relief may be granted.

For the reason already stated, we cannot affirm the district court's dismissal of count seven on the ground of preemption. Because the dismissal of that count in the first amended complaint was erroneous, we cannot affirm the dismissal in the second amended complaint on the basis of the court's earlier action. We therefore must consider whether the dismissal of count seven can be affirmed on the basis originally urged in the district court by some of the defendants and now urged before us by all of them: the failure to state a claim on which relief may be granted. *See infra* part II.B.2.b.

In their second amended complaint, the Conchas restated their seven claims against each group of defendants. While essentially repeating the allegations contained in the prior complaint regarding the state-law claims, the Conchas amended their allegations with respect to ERISA standing. The second amended complaint stated:

At all relevant times, plaintiffs Pano Concha and Marta Concha (collectively "Conchas") were employees of The Pano Concha, M.D., a Professional Corporation, *1499 and thus were participants and beneficiaries of The Pano Concha, M.D., a Professional Corporation Defined Benefit Plan (the "Plan"). At all relevant times, the Conchas were also fiduciaries of the Plan.

The complaint alleged the following breaches of duty under ERISA: All defendants, and each of them, breached their ERISA fiduciary duties to the Plan, by, among other things:

a. Paying out assets of the Plan which were neither for the benefit nor for the reasonable expense of administering the Plan, all in violation of 29 U.S.C. § 1104(a)(1)(A) and related statutes, including, without limitation, the taking of Plan assets for the defendants' personal use;

b. Engaging in self-dealing and prohibited transactions with Plan;

c. Loaning out Plan assets in amounts and on terms inconsistent with law;

d. Causing excess assets to be contributed to Plan, jeopardizing and threatening tax-exempt status; and

e. Failing to discharge their duties with respect to Plan:

(i) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity, and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

(ii) by diversifying the investments of Plan so as to minimize the risk of large losses, where no circumstances existed under which it was not prudent to do so;

(iii) in accordance with the documents and instruments governing the Plan.

The complaint further alleged that the defendants had been unjustly enriched, and that they should be held personally liable to the Plan for any losses